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Supreme Court, U.S.
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No. 86-1114

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE STATE OF MINNESOTA, et al.,

Cross-Petitioners

—v.—

JANE HODGSON, et al.,

Respondents.

BRIEF OF RESPONDENT JANE HODGSON IN OPPOSITION TO CROSS-PETITION FOR CERTIORARI

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QUESTION PRESENTED

Should a Conditional Cross-Petition for Certiorari be granted where it fails to present substantial, meritorious issues for review previously raised by Cross-Petitioners in the proceedings below.

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OPINION BELOW

The opinion below is set forth at pages 34a-137a of the Appendix to the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit in Hodgson et al. v. State of Minnesota et al. S.Ct. No. 86-882. The opinion of the district court is reported at 648 F. Supp. 756 (D. Minn. 1986).

JURISDICTION

Respondents herein incorporated by reference the jurisdictional statement set forth in their Petition For A Writ Of Ceriorari To The United Strates Court Of Appeals For The Eighth Circuit, Supreme Court No. 86-882.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Respondents herein incorporate by reference the Statement of Statutory And Regulatory Provisions Involved set forth in their Petition For A Writ Of Ceriorari To The United Strates Court Of Appeals For The Eighth Circuit, Supreme Court No. 86-882.

STATEMENT OF THE CASE

Respondents herein incorporate by reference the Statement Of The Case set forth in their Petition For A Writ Of Ceriorari To The United Strates Court Of Appeals For The Eighth Circuit, Supreme Court No. 86-882.

REASONS FOR DENYING THE WRIT FILED BY CONDITIONAL CROSS-PETITIONERS

Plaintiffs[1/] do not of course object to the general principle that should the Court decide to grant their petition for Writ of Certiorari (No. 86-882) the Court may also grant a cross-petition raising substantial, meritorious issues for review previously raised by the defendants below. Instead of presenting such issues, however, the instant Conditional Cross-Petition makes arguments never raised below which distort the opinion of the district court and prior decisions of this Court as well.

[1/] Respondents to the Conditional Cross-Petition (No. 86-1114) will refer to the parties according to their designations before the district court.

I. The Cross-Petition Should Not Be Granted To Entertain Defendants' Arguments That Notice Is Different Than Consent.

First, defendants expressly conceded below that a requirement of parental notification is subject to the same rigorous review as is a requirement of parental consent. Defendants never briefed the issues now raised in their Cross-Petition and the court below found that "[t]he parties agreed in response to a question from the Court that the constitutional analysis applicable to notice requirements does not differ from that applicable to consent requirements." (97a) (emphasis added).

Second, any contention that mandatory notice is not an interference with minors rights which requires the heightened scrutiny of this court is without merit. This Court has made clear that fundamental rights are

not subject to a balancing test but are instead protected by searching judicial scrutiny from any burdensome state legislative infringement. See City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 420 n. 1 (1983) (rejecting dissent's "undue burden" test as a balancing of fundamental rights); Nyberg v. City of Virginia, 667 F.2d 754, 757 (8th Cir. 1982), appeal dismissed, 462 U.S. 1125 (1983); see also Thornburgh v. American College of Obstetricians and Gynecologists, __ U.S. __, 106 S.Ct. 2169, 54 U.S.L.W. 4618 (1986) (implicitly rejecting the "undue burden" test once again argued by a dissenter, id. at 4640 (O'Connor, J. dissenting)).

Consistent with these standards, this Court has applied heightened scrutiny in reviewing laws which require any sort of parental involvement in a minor's abortion choice. Akron, 462 U.S. at 427-28 n. 10;

Indiana Planned Parenthood v. Pearson, 716 F.2d 1127, 1132 (7th Cir. 1983). Thus a statute requiring parental notification, no less than consent, must "plainly serve[] important [or significant] state interests... [and be] narrowly drawn to protect only those interests." H.L. v. Matheson, 450 U.S. 398, 413 (1981); id. at 409-413 (finding that the assumed interference of notification was justified regarding immature minors by the asserted state interests).[2/] "To constitute a legally significant burden ... a state regulation need not forbid abortion or give another the power to do so; it must merely have the potential to frustrate or delay" the decision. See Planned Parenthood of Rhode

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[2/] A majority of the Justices in H.L., for example, held that notification was unconstitutional as to mature or "best interest" minors without a meaningful judicial bypass procedure. Id. at 414, 420 (Powell, J. concurring) (joined by Stewart, J.); id. at 450-51 (Marshall, J. dissenting) (joined by Blackmun and Brennan, J.J.).

Island v. Board of Medical Review, 598 F. Supp. 625, 634 (D.R.I. 1984).

Finally, this Court has previously recognized that parental notification is not in fact distinguishable from a parental veto power. "[M]any parents hold strong views on the subject of abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct both abortion and their access to court." Bellotti v. Baird, 443 U.S. 622, 647 (1979) (Bellotti II). Because notice in fact amounts to consent for minors who are emotionally and financially dependent, this Court found unconstitutional a statute which required notification to parents of the court bypass process. See Point II infra.

For these reasons, and based upon the factual record established at trial, the court below specifically concluded "that it

is 'parental involvement' that an emancipated or mature minor must have an opportunity to avoid, without regard to whether that 'involvement' takes the form of notification or consent." (97a-98a).

The Court below correctly applied the precedents of this Court and thus defendants' Cross-Petition should not be granted on this ground.

II. The Cross-Petition Should Not Be Granted To Consider Defendants' Opposition To The "Ex Parte" Nature Of A Minors' Bypass Hearing

Defendants next appear to contend that parents are entitled to procedural due process protection before they are deprived of their alleged "right ... to raise their minor children and participate in the conduct of their lives." Conditional Cross-Petition, No.

86-1114 at 7. Citing no authority and noting that "[i]t may well be wise to conclude that the balance between [parents' and minors'] rights should not be struck in favor of authorizing parental veto of the abortion decision," defendants claim that:

> ... the most basic and minimal provision which may be made for the protection of any right is entitlement to notice and an opportunity to be heard where that right is to be jeopardized. To eliminate the general right to notice and to authorize, by dint of constitutional mandate, either the abortion provider or a judge upon mandatory ex parte process to veto the parental right to participate in, or even know of, this critical event in their child's life is, in essence, to eliminate the parental right totally in this area.

Id. This argument is not only new to the record of this case but is plainly preposterous.

First, reduced to its core, defendant's argument requires notification to parents prior to the so-called "deprivation" of their

alleged rights[3/] by an "ex parte" court-ordered waiver of mandatory notification. This is precisely the argument rejected by this Court in Bellotti II, 443 U.S. at 647-48.

In Bellotti II, this Court found unconstitutional a Massachusetts statute which had been interpreted by the state's Supreme Court to require "that an available parent must be given notice of any judicial proceedings brought by a minor" to avoid parental consent. Id. at 646. Noting that such a requirement would permit some parents to obstruct the minor's access to the court-ordered waiver procedure, this Court concluded that "every minor must have the opportunity -- if she so desires -- to go directly to a court without first consulting or notifying her parents." Id. at 647. In

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3/ See discussion of this "right" and its alleged violation infra.

short, this Court has expressly decided that parents have no right to know or consent to their mature adolescent daughter's decision to terminate her pregnancy[4/] and thus no right to notice and an opportunity to be heard before she is adjudicated mature or "best interest"[5/] by a judicial decision maker. To notify parents that they will not be notified is, of course, an exercise in the absurd.

Second, while the state may well have an interest in regulating to promote family

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4/ This is because the right to privacy protects a woman's "interest in independence in making certain kinds of important decisions" as well as her "interest in avoiding disclosure of personal matters," Whalen v. Roe, 429 U.S. 589, 599-600 (1977), and because a state may not make a "blanket determination" that all minors are too immature or that it is against the best interests of all minors to obtain a confidential abortion. See Akron, 462 U.S. at 440.

5/ Plaintiffs use the term "best interest" as a convenient way to refer to minors whose best interests have been judicially determined to be contrary to parental involvement.

integrity or autonomy,[6/] such a state interest is not synonomous with an assertion of "parents' rights." No parent has intervened on behalf of defendants in defense of the statute and defendants, quite properly, did not seek to justify the parental notification law in the proceedings below on this ground. "The state's interests in promulgating a notification statute are to protect the minor from making an inappropriate decision and to promote family integrity; the state's role is not that of an advocate for interests which might be asserted by parents." Akron Center for

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[6/] Plaintiffs do not concede that such an interest is legitimate or, even if it is, that a parental notice requirement operates to further this interest. To the contrary, the court below specifically found that "Defendants failed ... to establish that the law promotes these values more than it undermines them. Five weeks of trial have produced no factual basis upon which the court can find that Minn. Stat. § 144.343(2)-(7) on the whole furthers in any meaningful way the state's interest in protecting pregnant minors or assuring family integrity." (79a).

Reproductive Health v. Rosen, 633 F.Supp 1123, 1137 (N.D. Oh. 1986) (permanently enjoining Ohio's newly enacted parental notification and judicial bypass law); See also Doe v. Irwin, 615 F.2d 1162 (6th Cir.), cert. denied, 449 U.S. 829 (1980).

In fact, the only parents who are parties in this case are plaintiffs, some of whom have testified that the law's requirement of notice to the second biological parent as well as its coercive requirements that their adolescents notify them in order to be able to obtain abortion services are against their interests as parents and against the interest of their daughters and families.[7/]

[7/] Moreover, even if a parent-intervenor were present in this case, his or her rights could only be properly asserted against governmental infringement. Minnesota has passed no law prohibiting parental knowledge and a right of control over one's child, if applicable here, is not violated by a state's failure to specifically assure such control or a court order invalidating an attempt to do so. In short, neither Minnesota nor

III. The Writ Should Not Be Granted To Consider The Severability Of The Offending Statutory Provisions

The trial court held that the two-parent requirement was not severable from the remainder of the statute and that, accordingly, the entire statute must fall. Two Minnesota statutes govern this determination, Minn. Stat. § 645.20, which is a general provision regarding severability, and Minn. Stat. § 144.343, subd. 7, which is a specific severability provision applicable to the statute in question. These statutes must be construed so as to avoid conflict between them. See, e.g., Village of Blaine v. Independent School

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this court are responsible for the poor quality of communication between some parents and their adolescent children.

District No. 12, 272 Minn. 343, 138 N.W. 2d 32, 42 (1965).

The Minnesota Supreme Court has held that under such statutes, "if part of a law is unconstitutional, the remaining portion must nevertheless be sustained and given effect if enough is left to constitute an enforceable law." Saari v. Gleason, 126 Minn. 378, 148 N.W. 293, 296 (1914) (emphasis added). After severability the statute must "still be complete and workable," C. Thomas Stores Sales System v. Spaeth, 209 Minn. 504, 297 N.W. 9, 18 (1914), notwithstanding any gaps left by severance, since the legislature "does not address the issue of how to deal with unconstitutional gaps." Bongard v. Bongard, 342 N.W. 2d 156, 159-160 (Minn. App. 1983).

Furthermore, this Court has held that even where there is a broad severability clause such as those in the present case, severance is not permitted if "the radical dissection necessary for this would leave [the statute] with little resemblance to that intended by the [state] Legislature." Thornburgh, 106 S.Ct. at 2181 (1986); see also Akron, 462 U.S. at 445, n. 37. As was noted in Huntington v. Worthen, 120 U.S. 97, 102, 7 S.Ct. 469, 471 (1887), when the unconstitutional and constitutional portions of a statute "are necessary parts of one system ... the whole act will fall with the invalidity of one clause. When there is no such connection and dependency, the act will stand ...". Accord, Field v. Clark, 143 U.S. 649, 12 S.Ct. 495, 503-506 (1892); Women's Services, P.C. v. Thone, 636

F.2d 206, 210 (8th Cir. 1980), vacated on other grounds, 452 U.S. 911 (1981).

The definition of "parent" in subdivision 3 is an integral part of the statue and clearly reflects the intent of the legislature. It is so intertwined with the remainder of the statute that severing it would do violence to the legislative scheme. The sponsor of the Senate Bill 297 specifically stated on two occasions that the law was intended to require notice to both parents of the minor. See Exhibits C and D to Plaintiffs' Post-Trial Brief, Conclusions of Law, and Order for Judgment dated May 17, 1986. Moreover, the plural term "parents" is used twice in Minn. Stat. § 144.343, subd. 6(c)(i). Merely tinkering with the definition of the singular "parent," as the respondents

suggest, will undermine instead of effectuating the legislative intent. that problem. As the Fifth Circuit noted in Scheinberg v. Smith, 659 F.2d 476, 481 (5th Cir. 1981), courts cannot "sever and repair state statutes at will, for to do so would be to ignore the primary role of the ... legislature."

The trial court correctly applied the undisputed legal principles in determining that severance of the unconstitutional provision from the remainder of the statute was not possible. (132a, 133a-136a.) In particular, the court found that the legislature would not have enacted the statute without the definitional section of "parent" and that "the remainder of the statute cannot be given effect without the offending language."

(134a.) Moreover, the court reviewed the alternatives to the two-parent provisions and found itself "ill-situated" to redraft the statute or to predict which of several options the legislature would have chosen since each would leave the statute "with little resemblance to the program actually [and originally] intended by the Minnesota legislature." (134-35a.) The court's conclusion was both reasonable and correct as a matter of law. Accordingly, no issue of great moment is presented by the defendants' request that this Court consider whether severance would have been appropriate.

CONCLUSION

For the foregoing reasons, plaintiffs urge the Court to deny

defendants' Conditional Cross-Petition for Certiorari (No. 86-114) should it decide to grant plaintiffs' Petition for Certiorari (No. 86-882).

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